IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 276

Suit No 1153 of 2017

Between

Materials Industry and Trade (Singapore) Pte Ltd

… Plaintiff

And

Vopak Terminals Singapore Pte Ltd

… Defendant

Between

Vopak Terminals Singapore Pte Ltd

… Plaintiff in Counterclaim

And

Materials Industry and Trade (Singapore) Pte Ltd

… Defendant in Counterclaim

JUDGMENT

[Commercial Transactions] — [Sale of goods]
[Credit and Security] — [Lien]

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[Contract] - [Contractual terms] - [Interpretation]
[Contract] - [Contractual terms] - [Interpretation] - [Subsequent conduct]
[Agency] - [Agency by estoppel]

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Materials Industry and Trade (Singapore) Pte Ltd
v
Vopak Terminals Singapore Pte Ltd

[2019] SGHC 276

High Court — Suit No 1153 of 2017
Ang Cheng Hock J
12–15 March, 16, 17 April; 13 June 2019

28 November 2019 Judgment reserved.

Ang Cheng Hock J:

Introduction

1 This dispute concerns the actions of a storage company in disposing a cargo of about 2,000 metric tonnes of Palm Methyl Ester ("PME"), which was stored in one of its tanks, because of the outstanding liabilities of its customer, who had long-term exclusive use of the tank. The plaintiff, who had sold the cargo of PME to the customer, claims that it was still the owner of the PME when it was disposed of by the defendant, the storage company. This disposal was alleged to be in breach of the plaintiff's right to possession of the PME cargo as its owner. It has thus brought this action for damages. The defendant, on the other hand, insists that it was simply asserting its rights under its contract with its customer, which provided for the defendant to have a contractual lien to retain and dispose of the PME, and apply the sale proceeds in discharge of the outstanding liabilities owed to it.

Facts

Relevant parties

2 The plaintiff is a private company incorporated in Singapore which specialises in the trading of oil and gas products.[1] The defendant is an independent tank storage service which is in the business of storage and handling of liquid chemicals, gases and oil products.[2] The defendant owns a storage terminal and related facilities located at 51 Banyan Avenue, Jurong Island, Singapore (the "Banyan Terminal").

3 In 2014, the plaintiff entered into an agreement to sell 2,000 metric tonnes of PME to IBRIS Bio-fuels Pte Ltd ("IBRIS"). The details of this agreement are set out at [14]–[16] below. IBRIS was a private company whose business concerned the production and extraction of vegetable oil and sugar, bio-fuels refining and bio-energy power generation.[3] This included PME, a biodiesel produced from palm oil. The PME purchased from the plaintiff was stored at the Banyan Terminal, where IBRIS had the exclusive use of several of the defendant's storage tanks pursuant to a service agreement. IBRIS was wound up following a creditors' voluntary liquidation on 14 August 2015.[4]

IBRIS's service agreement with the defendant

4 The current dispute arises from the clash between the legal effects of IBRIS's sale and purchase transaction with the plaintiff on the one hand, and on

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1 Jenn Elisah Lim's ("Lim") Affidavit of Evidence-in-Chief ("AEIC"), para 4.

2 Ong Saw Wah Susie's ("Ong") AEIC, para 7.

3 Lim's AEIC, paras 7-8, JEL-1 p 62 .

4 Choong Choon Yean's ("Choong") AEIC, para 1.

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the other hand, IBRIS's long-term business arrangements with the defendant. Both the plaintiff and the defendant argue that they had the immediate right of possession of the PME cargo by reason of their respective written agreements with IBRIS. I shall therefore set out these agreements in some detail, beginning with the service agreement entered into between IBRIS and the defendant.

5 In or around 25 August 2006, the defendant entered into an agreement with a biodiesel production company known as Natural Fuel Pte Ltd ("NFPL") to "design, construct, operate and maintain the storage tanks, pipelines and equipment ("the Dedicated Facilities") at the [Banyan] Terminal … for the dedicated use of [NFPL]".[5] It was agreed that there would be seven storage tanks with a combined storage capacity of 105,000 cubic metres. NFPL owned and operated a biodiesel manufacturing facility at 2 Banyan Place, Jurong Island, Singapore 627700 ("2 Banyan Place") which is adjacent to the Banyan Terminal. The objective of NFPL's agreement with the defendant was for NFPL to have a convenient storage location near to its manufacturing facility.

6 The construction of the seven tanks was completed in early 2008 and cost approximately S$37.2m.[6] However, in or around April 2009, NFPL went into receivership and its agreement with the defendant was terminated shortly thereafter.[7] NFPL's manufacturing facility at 2 Banyan Place was then acquired by IBRIS. Separately, the defendant decided to modify storage tanks which had

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5 Choong's AEIC, para 9, CCY-3 p 106.

6 Ong's AEIC, para 12, SO-1 p 53.

7 Choong's AEIC, para 11.

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been initially designed and constructed for NFPL so that they could be marketed to its petrochemical customers.[8]

7 In or around April 2010, whilst these modification works were still ongoing, IBRIS approached the defendant to lease about 50,000 cubic metres of storage tanks. IBRIS wanted these storage facilities for its exclusive use, in the same way that NFPL had, for the storage of its bio-fuel products and/or raw materials. The defendant agreed to provide storage tanks and related facilities for IBRIS's dedicated use. On 19 July 2011, IBRIS entered into a service agreement with the defendant (the "Service Agreement").[9] The initial lease term was for the period from 1 August 2011 to 31 July 2016.[10] As per the Service Agreement, the following tanks were provided by the defendant for IBRIS's use:

(a) 1 x 20,000 cubic metres carbon steel tank ("Tank 1102");

(b) 1 x 20,000 cubic metres carbon steel tank ("Tank 1104");

(c) 1 x 10,000 cubic metres carbon steel tank ("Tank 1106"); and

(d) 1 x 2,600 cubic metres carbon steel tank for the period of 1 August 2011 to 31 January 2012 and thereafter 1 x 5,000 cubic metres carbon steel tank for the period of 1 February 2012 to 31 July 2016.

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8 Ong's AEIC, para 14.

9 Choong's AEIC, para 7, CCY-2 p 47; 1 Agreed Bundle ("AB") 115-171.

10 1AB 125.

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8 Pursuant to cl 19.1 and Appendix C of the Service Agreement, IBRIS was to pay the following fixed monthly fees which would be subject to yearly adjustments from 1 August 2012:[11]

(a) S$578,600.00 per month from 1 August 2011 to 31 January 2012;

(b) S$605,000.00 per month from 1 February 2012 to 31 July 2012; and

(c) S$687,500.00 from 1 August 2012 to 31 July 2016.

IBRIS was also obliged to pay variable fees for electricity, internal transfer/blending, tank cleaning and waste disposal.[12] Under cl 19.2.1, all sums were due and payable "without demand and without deduction" no later than 30 days after the date of the defendant's invoice.[13]

9 The Service Agreement specified the products to be stored in the tanks as "[b]iodiesel, RBD Palm oil, rapeseed oil, soy bean oil and any other feedstocks that can be handled through the Facilities, meeting the Product Specifications".[14] PME is included within this description.

10 For the purpose of these proceedings, there are three other important clauses in the Service Agreement which I should highlight. Under cl 20, the

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11 Choong's AEIC, para 15; 1AB 144-145, 169.

12 1AB 170.

13 1AB 145.

14 Ong's AEIC, para 19; 1AB 122.

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defendant was to have a right of lien and retention over IBRIS's products stored at the Banyan Terminal in the event that the security provided by IBRIS was either insufficient or invalid. Flowing from this, cl 22 provided for the defendant to have a right of disposal over IBRIS's products. This would allow the defendant to sell the stored products and use the sale proceeds to pay off any outstanding liabilities due to it. Lastly, pursuant to cl 39, IBRIS was required to provide two bank guarantees to the defendant. The first guarantee was to be provided before 1 August 2011 for the period from 1 August 2011 until 31 July 2012 for a sum of S$4,960,000. The second guarantee of S$5,625,000 was to be provided before 1 July 2012 for the period from 1 August 2012 until the expiration or termination of the Service Agreement. The relevant portions of these three clauses I have referred to are set out below:[15]

> **20. RIGHT OF LIEN AND RETENTION**
>
> Subject to Clause 39.1 and in the event the security provided by the Customer under Clause 39.1 is not sufficient or ceases to be valid for the purposes described in Clause 39.1, [the defendant] shall have a right of lien and retention over the Product and all sums, documents which [the defendant] shall now or hereafter hold of or on behalf of [IBRIS] or which is now or hereafter due to [IBRIS], to secure the payment of all such sums payable by [IBRIS] to [the defendant] and the discharge of all liabilities of [IBRIS] to [the defendant] under this Agreement.
>
> …
>
> **22. RIGHT OF DISPOSAL**
>
> 22.1 Circumstances
>
> Without prejudice to Clause 22.2:

15 Choong's AEIC, CCY-2, pp 79–81, 92; 1AB 147-149, 160-161.

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(1) If [IBRIS] fails to remove the Product due to any reason whatsoever upon or before the expiry or sooner termination of this Agreement; or

(2) if [IBRIS] fails to pay to [the defendant] any sum due under and in accordance with Clause 19.2.1 due to any reason whatsoever, except due to the default of [the defendant] or where a sum is disputed in good faith, for any period longer than sixty (60) days after [the defendant's] notification given under Clause 19.2.2(5),

[the defendant] shall, in the event the security provided by [IBRIS] under Clause 39.1 is not sufficient or ceases to be valid for the purposes described in Clause 39.1 (including to secure the due and proper performance and observance by [IBRIS] of its obligations under this Agreement), be entitled, by giving [IBRIS] not less than seven (7) days' prior notice, to remove the Product from the Dedicated Facilities to any place in or outside the Terminal and may dispose of and/or destroy the Product in such manner as [the defendant] deems fit and at the risk and expense of [IBRIS] (including disposal of the Product by sale, by private treaty or public auction).

22.2 Disposal

If [the defendant] shall decide to dispose of the Product pursuant to and in accordance with Clause 22.1 by sale by private treaty or public auction:

(1) [the defendant] shall be entitled to open or break open without being liable for any damage caused thereby, any container or any other package containing the Product; and

(2) any proceeds of sale shall be applied by [the defendant] in the following manner:

a. firstly, in payment of all sums of whatever nature due from [IBRIS] to [the defendant] under this Agreement;

b. secondly, in payment of the expenses of the removal and disposal and any storage of the Product in the period between such removal and disposal;

c. thirdly, in payment of any sums due from [IBRIS] to the Legal Authority and

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d. fourthly, in payment of other claims or liens of which notice has been given by third parties to [the defendant]

and by rendering any surplus to [IBRIS] immediately.

…

39. SECURITY

39.1 Sums, period and form

[IBRIS] shall:

(1) before 1st August 2011 and until 31st July 2012, furnish security for the sum of Singapore Dollars Four Million Nine Hundred and Fifty Thousand (S$ 4,950,000.00); and

(2) on or before 1st July 2012, furnish security for the sum of Singapore Singapore [*sic*] Dollars Five Million Six Hundred and Twenty Five Thousand (S$5,625,000.00) for the period from 1st August 2012 to the expiry or termination of this Agreement;

both in the form of a bank guarantee required by [the defendant] for the due and proper performance and observance by [IBRIS] of its obligations under this Agreement to pay all sums due under this Agreement, and [IBRIS] shall maintain such for so long as this Agreement continues in force Provided that [IBRIS] may at any time after the Commencement Date, choose to furnish [the defendant] with such security but for the sum of Singapore Dollars Seven Million One hundred and One thousand (S$7,101,000.00) or the sum of Singapore Dollars Eight Million Two hundred and Fifty Thousand (S$ 8,250,000.00) instead of the sum stipulated in paragraph (1) or (2) above respectively, and in the form required by [the defendant], and upon furnishing of such security –

a. Clause 20 and all references in this Agreement thereto shall immediately be deleted from this Agreement; and

b. all references elsewhere in this Agreement to the security provided by the Customer under Clause 39.1 shall then be references to the security described in this proviso.

…

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> 39.3 Payment within demand period
>
> [IBRIS] shall pay to [the defendant] a cash sum (or replacement bankers guarantee as permitted under this Agreement) equal to the amount applied by [the defendant] under Clause 39.2, as replacement of the part or whole of the security deposit applied against amounts unpaid by [IBRIS] in accordance with the terms of the security, within seven (7) days of demand.
>
> [emphasis in original]

11 Cl 39.1 was subsequently varied by the parties, as recorded in a letter from the defendant to IBRIS dated 29 November 2012.[16] The relevant amendments related to the number of bank guarantees IBRIS was required to furnish, as well as the dates by which these guarantees were required to be furnished. Instead of providing one bank guarantee for the period from 1 August 2012 to the end of the Service Agreement (see cl 39.1(2)), under the new arrangement, IBRIS was required to furnish two guarantees. The first guarantee was required by 30 November 2012 for the period from 29 November 2012 to 28 November 2014 for a sum of S$5,625,000 ("BG1"). The second guarantee was required by 29 May 2014 for the period from 29 November 2014 to 31 July 2016 for a sum of S$5,625,000. The relevant portion of the letter is reproduced below:

> (a) Ibris shall produce in favour of [the defendant] a Bank Guarantee for the amount of SGD 5,625,000.00 valid from 29 November 2012 to 28 November 2014 (both dates inclusive) (hereinafter the "BG1"), which BG1 shall be delivered to [the defendant] no later than 4 p.m. on 30 November 2012;
>
> (b) Ibris shall produce in favour of [the defendant] a Bank Guarantee for the amount of SGD 5,625,000.00 valid from 29 November 2014 to 31 July 2016 (both dates inclusive) (hereinafter the "BG2"), which BG shall be delivered to [the defendant] no later than 4 p.m. on 29 May 2014;

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16 Ong's AEIC, SO-3; 1AB 218-219.

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…

Modifications for IBRIS

12 Pursuant to the Service Agreement, the defendant undertook further modifications of its facilities in line with IBRIS's requirements, namely, to modify the equipment relating to and pipelines connecting Tanks 1102, 1104 and 1106.[17] This was paid for by IBRIS. Mr Ravindran Visnathan, the defendant's operations manager at the Banyan Terminal,[18] provided the details of these modifications in his evidence. A pipeline, the "rundown line",[19] was installed to run between IBRIS's facility at 2 Banyan Place and the Banyan Terminal. The rundown line diverges into separate pipelines which connect to Tanks 1102, 1104 and 1106 respectively. The separate pipelines for removals from the tanks converge into another single pipeline, the "feed line", which runs from the Banyan Terminal to IBRIS's facility at 2 Banyan Place.

13 This system of pipelines is known as a "common system" because the pipelines running to and from each of the three tanks connect to "common pipelines" which run between the facility at 2 Banyan Place and the Banyan Terminal.[20] For completeness, there is also a "jetty line" which connects from the jetties at the Banyan Terminal to the tanks.[21]

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17 Ong's AEIC para 22.

18 Notes of Evidence ("NE"), 15 March 2019, p 43, lines 4-5.

19 NE, 15 March 2019, p 62 line 14 to p 63 line 2.

20 Ravindran Visnathan's AEIC, paras 9-10.

21 NE, 15 March 2019, p 63 line 20 to p 64 line 6.

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IBRIS's agreement with the plaintiff

14 I now turn to the contractual relationship between IBRIS and the plaintiff. In or around August 2014, IBRIS's Vice-President (Commercial), Mr Choong Choon Yean ("Mr Choong"), approached one of the plaintiff's commodity traders, Ms Jenn Elisah Lim ("Ms Lim"), to determine the plaintiff's interest in a potential transaction for the sale and purchase of a cargo of PME. Ms Lim knew Mr Choong socially because he was the brother of an ex-colleague of hers.[22] IBRIS was intending to purchase a quantity of 3,000 metric tonnes of PME from Antara Commodities (M) Sdn Bhd ("Antara") and Future Prelude Sdn Bhd ("Future Prelude").[23] IBRIS also had a ready buyer for this quantity of PME, British Petroleum Singapore Pte Ltd ("BP"). Antara and Future Prelude required IBRIS to make upfront payment whilst BP wanted to purchase the cargo from IBRIS on 30 days' credit terms. According to Mr Choong, IBRIS was facing cash flow problems and would be unable to pay Antara and Future Prelude prior to the PME's delivery.[24] It also could not afford to extend a month's credit to BP.[25] Mr Choong thus proposed to Ms Lim that the plaintiff purchase the PME from Antara and Future Prelude on immediate payment terms. The plaintiff would then sell the PME on credit terms to IBRIS and IBRIS would conduct a back-to-back sale with BP.[26] The plaintiff would make the margin between what it paid Antara and Future Prelude and its selling price to IBRIS.

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22 Lim's AEIC, para 12.

23 Choong's AEIC, para 17.

24 Choong's AEIC, para 21.

25 Lim's AEIC, para 18.

26 NE, 14 March 2019, p 7 lines 13-19; p 10 line 18 to p 11 line 2.

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15 The plaintiff was agreeable to this proposal. Ms Lim considered this a "low-risk transaction" given that BP was the intended end-buyer.[27] In the initial stages of negotiation, the plaintiff had suggested that it could in fact be a joint party with IBRIS in selling the cargo directly to BP.[28] However, BP was not amenable to purchasing the PME directly from the plaintiff because BP's management had pre-approved IBRIS as the selling counter-party.[29] It was thus agreed that IBRIS would be the immediate purchaser of the PME from the plaintiff. IBRIS would then on-sell the cargo to BP. The plaintiff executed an agreement with Antara for the sale and purchase of 2,500 metric tonnes of PME ("Antara Agreement"),[30] paying US$815 per metric tonne.[31] This was dated 29 August 2014. The plaintiff remitted US$2,037,500 to Antara in payment for the PME cargo on 8 September 2014.[32] The Antara Agreement is governed by the terms and conditions established by The Palm Oil Refiners Association of Malaysia ("PORAM"). No agreement was entered into with Future Prelude as IBRIS later informed the plaintiff that the additional cargo was no longer required.

16 IBRIS executed a sale and purchase agreement (the "Sale and Purchase Agreement") with the plaintiff, dated 29 August 2014, for the 2,500 metric tonnes of PME on the same terms as the Antara Agreement, save that IBRIS

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27 Lim's AEIC, para 20; NE, 13 March 2019, p 8, lines 19-21.

28 NE, 14 March 2019, p 7, lines 22-25.

29 Choong's AEIC para 29.

30 Choong's AEIC, CCY-5; 1AB 33.

31 Lim's AEIC, para 24.

32 Lim's AEIC, para 29; JEL-1 pp 82-83.

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would pay the plaintiff US$832 per metric tonne.[33] Delivery of the PME was "FOB ITT", which refers to "free on board", "in-tank transfer". Hence, the plaintiff's obligation was to deliver the cargo into IBRIS's nominated tank. IBRIS would then have 30 days after the completion of delivery to make payment.[34]

17 Delivery of the PME by Antara began on 2 September 2014. This was organised between Antara and IBRIS and the plaintiff was not involved. After deliveries had commenced, IBRIS instructed Antara to reduce the contractual amount to 2,000 metric tonnes.[35] The plaintiff was only informed of this arrangement shortly before 15 October 2014, but it had no issue with this change in the quantity of the PME despite the terms of its agreements with Antara and IBRIS. The plaintiff wrote to Antara, seeking a refund of US$500,000.[36] Antara took the position that it was entitled to deduct goods and service tax amounts due on import and delay penalties from this figure.[37] Antara made payment of US$150,000 to the plaintiff on 20 October 2014.[38] This was followed by three further payments totalling US$117,494.96.[39] The plaintiff accepted this in satisfaction of the refund owed. A total quantity of 2,000.09 metric tonnes of PME ("the PME cargo") was delivered in 67 separate batches to 2 Banyan Place from 2 September to 17 October 2014. IBRIS then transferred the PME cargo

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33 1AB 256-257.

34 Lim's AEIC, para 37; JEL-1 pp 607-609.

35 Lim's AEIC, para 65.

36 Lim AEIC, para 67, JEL-1 p 638.

37 Lim's AEIC, para 71.

38 1AB 286.

39 Choong's AEIC, para 43(c); Lim's AEIC, para 70.

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to Tank 1102 at the Banyan Terminal by way of the "common system".[40] This was done in 16 batches from 15 September to 17 October 2014. The material safety data sheet provided by IBRIS to the defendant in respect of the PME cargo stored in Tank 1102 listed the manufacturer of the PME as "Natural Fuel Resources Pte. Ltd.", which was IBRIS's former name.[41]

Other developments

The plaintiff's storage agreement with IBRIS

18 When the plaintiff entered into the Antara Agreement and the Sale and Purchase Agreement, it anticipated that delivery of the PME cargo would be completed before October 2014.[42] This expectation did not materialise. This was a concern for the plaintiff as it was aware that it would only receive payment from IBRIS 30 days after completion of delivery of the PME cargo. The plaintiff was aware that a longer period of delivery would prolong its exposure to the risk of IBRIS failing to pay. These concerns were fuelled by the fact that the plaintiff had received indications from Mr Choong that IBRIS might have difficulty paying for the PME cargo.[43] In an apparent response to what Mr Choong had conveyed, the plaintiff issued an invoice dated 26 September 2014, on the instructions of Ms Lim, for 1,176.69 metric tonnes of PME which had been delivered as of that date.[44] The invoice specified the due date for payment as 2 October 2014. No payment was made by IBRIS.

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40 Ong's AEIC, paras 47-48.

41 1AB 25-28.

42 Lim's AEIC, para 39.

43 NE, 13 March 2019, p 22, lines 1-15.

44 Lim's AEIC, para 43; JEL-1 p 610; 1AB 265.

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19 Subsequently, the plaintiff then proposed that it enter into a storage agreement with IBRIS (the "Storage Agreement").[45] This would set out that IBRIS held the PME cargo on the plaintiff's behalf pending payment. Cl 8 of the Storage Agreement stated that title to the PME cargo "shall not pass" to IBRIS until payment for the same was received by the plaintiff. According to Ms Lim's evidence, this clause was included as a safeguard to confirm that the plaintiff and IBRIS were on the same page as to who had title to the PME cargo.[46] In full, cl 8 reads:

> The title and property in the products, including full legal and beneficial ownership shall not pass to [IBRIS] until all debts owed to [the plaintiff], including any balances existing, are fully paid and settled by [IBRIS].

The Storage Agreement was executed on 15 October 2014, but *backdated* to 1 September 2014, the day before the first delivery of PME was made. The defendant's tank, Tank 1102, was identified in the Storage Agreement as the location where the PME cargo was being stored (see cl 4 of the Storage Agreement).

20 It appears that, despite the reduction of quantity of PME delivered, the plaintiff and IBRIS still proceeded on the basis that IBRIS would pay for 2,500 metric tonnes of PME at US$832 per metric tonne, which worked out to US$2,080,000.[47] IBRIS apparently made payment of US$150,000 on 20 October 2014; this was in fact the refund sent by Antara (at [17]) but treated by IBRIS and the plaintiff as a payment by IBRIS towards the price under the Sale

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45 1 AB 258-260.

46 NE, 13 March 2019, p 60, line 10-13.

47 1AB 288.

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and Purchase Agreement. This meant that IBRIS still owed the plaintiff a sum of US$1,930,000 for the PME cargo that was due 30 days after delivery was completed on 17 October 2014.[48] It became clear to the plaintiff that IBRIS was facing financial difficulties and would not be able to make payment of what was due. This prompted the plaintiff to execute a repayment agreement (the "Repayment Agreement") with IBRIS on 29 October 2014, setting out a repayment schedule for the outstanding sum.[49] Under the Repayment Agreement the parties also agreed to preserve their rights under the Storage Agreement.[50] IBRIS failed to comply with its obligations under the repayment schedule set out in the Repayment Agreement.[51] On 19 December 2014, the plaintiff issued a letter of demand through its solicitors.

IBRIS's failure to provide BG2

21 In the meantime, IBRIS was also in default of its obligations under the Service Agreement with the defendant. On 29 May 2014, IBRIS had failed to provide BG2 to the defendant in accordance with the varied cl 39 of the Service Agreement. This was in spite of several reminders sent by the defendant.[52] The defendant wrote on 21 July 2014 to remind IBRIS that BG2 was due.[53] On 25 July 2014, having received no response, the defendant sent another letter to give IBRIS notice of its intention to exercise its contractual right of lien on account

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48 1AB 286, 289.

49 1AB 284-293.

50 1AB 287.

51 1AB 316, paras 8-9.

52 Ong's AEIC, SO-4.

53 1AB 246.

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of the failure to provide BG2 and also due to unpaid invoices. The text of the letter read:[54]

> Dear Sir,
>
> **FINAL NOTICE: IBRIS BIOFUELS' BANK GUARANTEE**
>
> We refer to our letter dated 21 July 2014 which shall be superseded by this letter.
>
> Due to non-payment of outstanding invoice and no written reply from you, we are left with no alternative but to exercise the right of lien under the Service Agreement dated 19 July 2011, **with effect from 29 July 2014**, UNLESS you are able to produce the evidence that you are in the process of obtaining the Bank Guarantee, to us by close of business 29 July 2014.
>
> ALL RIGHT [*sic*] RESERVED.
>
> [emphasis in original]

22 The defendant then was informed by IBRIS's representative, Mr Sohan Ojah-Maharaj ("Mr Sohan"), that IBRIS was in the process of obtaining BG2.[55] Mr Sohan requested an extension of time until 31 August 2014 to provide BG2. The defendant agreed to this by way of an email dated 30 July 2014.[56] It was communicated to IBRIS that the defendant had received approval to "de-activate the current lien". However, IBRIS failed to provide BG2 by 31 August 2014.

23 The defendant sent two emails inquiring as to the status of BG2 but no substantive response was provided. On 12 September 2014, the defendant sent an email to IBRIS, indicating the possible legal actions that would be taken if

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54 Ong's AEIC, SO-5; 1AB 247.

55 Ong's AEIC, para 33.

56 Ong's AEIC, para 34; 1AB 20.

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BG2 was not provided.[57] Specific reference was made to the possible activation of the defendant's lien under cl 20 of the Service Agreement. This referred to the possible exercise of the lien over the products stored with the defendant.[58] On 16 September 2014, the defendant made a demand to Standard Chartered Bank ("SCB"), the issuer of BG1, to draw on BG1 for the sum of S$1,464,774.63 in respect of unpaid invoices for July and August 2014.[59] This payment was made by SCB on 25 September 2014.

24 On 8 October 2014, the defendant gave IBRIS notice of its intention to terminate the Service Agreement if IBRIS failed to furnish BG2 by 16 October 2014.[60] Once again, IBRIS failed to comply. On 17 October 2014, the defendant informed IBRIS that the Service Agreement would be terminated with effect from 29 November 2014.[61] On 18 October, the defendant wrote to SCB again, calling for payment of S$733,264.34 under BG1 for monthly fees payable under the Service Agreement for September 2014.[62]

25 On 20 October 2014, the defendant informed IBRIS of the estimated amount due to the defendant and demanded payment.[63] This estimated figure of S$16,151,272 consisted of S$1,467,532 for fees up to 28 November 2014 and S$14,683,740 for fees from 29 November 2014 to 31 July 2016. This latter sum

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57 1AB 40.

58 Ong's AEIC, para 44.

59 1AB 264.

60 1AB 273.

61 1AB 275.

62 1AB 276.

63 1AB 278-279.

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took into account the fact that the termination of the Service Agreement would accelerate payments due from IBRIS up to 31 July 2016. The defendant also informed IBRIS that it would continue to exercise its right of lien and retention over all stored products, which would include the PME cargo, unless payment was made. SCB paid the defendant the claimed sum of S$733,264.34 on 24 October 2014. This left an uncalled balance of S$3,426,961.03 on BG1 as of that date.

Dispute over the PME ownership

26 On 31 December 2014, the plaintiff wrote to the defendant for the first time to assert title to the PME cargo.[64] The plaintiff claimed that IBRIS's agreement with the defendant, in terms of custody and possession of the PME cargo, had been entered into "for and on behalf of [the plaintiff]" and this was pursuant to the terms of the Storage Agreement.[65] It directed the defendant not to release or transfer the cargo from Tank 1102 without its prior written notice or consent. The plaintiff also enclosed with its letter a copy of the Storage Agreement. The defendant did not respond to this letter as it was apparently informed by IBRIS that the latter would liaise with the plaintiff directly.

27 On 9 February 2015, the plaintiff wrote to IBRIS to give it notice that the plaintiff had accepted IBRIS's repudiatory breach of the Repayment Agreement and that agreement was terminated.[66] It also directed IBRIS to take all necessary steps to deliver up the PME cargo stored in Tank 1102. On 11

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64 1AB 312-313.

65 Ong's AEIC, SO-15.

66 1AB 314-317.

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February 2015, IBRIS communicated in a letter to the plaintiff that the defendant had asserted its right of lien and retention over the PME cargo.[67]

28 This prompted the plaintiff's solicitors to write to the defendant on 16 February 2015 to give notice that it held title to the PME cargo and was exercising its immediate right of possession.[68] They also requested for tank reports for Tank 1102 showing the quantity of PME stored. Subsequently, on 11 March 2015, the defendant's solicitors wrote to inform the plaintiff's solicitors that the defendant had exercised its "rights of lien and disposal" over the PME cargo.[69]

29 In March 2015, the defendant made arrangements to sell the PME cargo to a third party. The PME was eventually sold for US$893,494.53 in June 2015.[70] The sale proceeds received by the defendant, after converting to local currency, was S$1,187,962.02,[71] far short of what was due from IBRIS.

The plaintiff's case

30 The plaintiff's claim is that the defendant wrongfully converted the PME cargo by retaining it in Tank 1102 and thereafter selling it to a third party.[72] This conversion claim is premised on the plaintiff having title to the PME cargo at the material time. It was the plaintiff's and IBRIS's intention that title to the

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67 Lim's AEIC, para 101; 1AB 321.

68 1AB 333-334.

69 Lim's AEIC, para 104, JEL-1 p 1119; 1AB 348.

70 Ong's AEIC, paras 81-85.

71 Defence and Counterclaim (Amendment No 1), para 32(f).

72 Plaintiff's Closing Submissions ("PCS"), para 56.

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PME cargo would only pass upon complete delivery of the PME, and this was when the last batch was delivered on 17 October 2014. Before that happened, the parties also entered into the Storage Agreement to ensure that title remained with the plaintiff, or was returned to it, pending payment for the entire cargo by IBRIS. Given that IBRIS had no title over the PME cargo, the defendant had no right to deal with the PME cargo without the plaintiff's consent. The defendant was put on notice of the plaintiff's position as to its title by January 2015 at the latest.

31 The plaintiff contends that, if the defendant had a valid possessory lien capable of potentially encumbering the plaintiff's interest in the PME cargo, the right of lien did not arise until after 29 November 2014. This was well after the execution of the Storage Agreement on 15 October 2014, which the plaintiff alleges was the latest possible date when title to the PME cargo was returned to the plaintiff, assuming that title to the PME cargo had already passed before then through the delivery of each of batch of PME. Once it is clear that title to the PME cargo remained with the plaintiff, it is argued that the defendant could not exercise its lien over the cargo. In short, the defendant's lien is exercisable only over stored products which were owned by IBRIS.

32 The plaintiff denies the assertions made by the defendant that IBRIS was conferred with implied authority or had apparent authority to store the PME cargo in Tank 1102 on the plaintiff's behalf, thereby making the PME cargo subject to the defendant's lien even though the plaintiff still held title to it. The plaintiff was not privy to IBRIS's arrangements with the defendant. It only became aware of the defendant's contractual right of lien in March 2015 when the defendant refused to deliver up the cargo despite the plaintiff's demand.

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33 The plaintiff also argues that the defendant did not validly exercise its lien before 15 October 2014 because it never gave proper written notice to IBRIS of its intended exercise of the lien.

34 In response to the defendant's counterclaim for storage fees and other ancillary costs (as explained below), the plaintiff concedes that it would be required to pay "reasonable storage fees" from 1 October 2014 to 16 February 2015, the date on which the plaintiff demanded the return of the PME cargo (see above at [28]). It disputes the quantum of fees claimed by the defendant as being exorbitant and argues that any damages payable should be limited to S$147,284.26.[73]

The defendant's case

35 The defendant argues that it did not convert the PME cargo because it held the immediate right of possession of the cargo, not the plaintiff. The PME cargo was delivered to the Banyan Terminal in batches. According to the defendant, title passed to IBRIS when each batch was delivered on the basis of the PME being unconditionally appropriated, with the assent of the plaintiff and IBRIS, to the Sale and Purchase Agreement. The Storage Agreement did not have the effect of returning title to the plaintiff because, on its proper interpretation, cl 8 is only a retention of title clause that cannot operate retrospectively. Consequently, title to the delivered PME cargo had passed to IBRIS and the PME cargo became subject to the terms of the Service Agreement, in particular, the defendant's right of lien and right of disposal.

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[73] PCS, paras 79-80; See also, Lim's AEIC, para 90.

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36 Indeed, the defendant argues that this would have been the case *even if* the effect of the Storage Agreement was to return title to the plaintiff.[74] The defendant was still entitled to exert possessory control because there had been an insufficiency of security which triggered its right of lien. The defendant argues that its right to exercise its contractual lien arose when IBRIS failed to provide BG2 by 29 May 2014 and by the subsequent extended deadlines. This is because the failure to provide BG2 meant that the defendant had insufficient security as per the terms of the Service Agreement. The defendant argues that it validly exercised its contractual lien over the PME cargo in September 2014 before the Storage Agreement was entered into. A secondary justification advanced by the defendant is that IBRIS had been granted authority from the plaintiff to store the PME cargo at the Banyan Terminal. The plaintiff knew that the stored cargo at the defendant's premises would have been subject to certain terms and conditions such as a right of lien. It cannot therefore now claim to be ignorant of them.

37 By way of counterclaim, the defendant seeks to recover from the plaintiff the outstanding storage fees for the PME cargo from 1 October 2014 until the time of its disposition, 6 June 2015. In the alternative, the defendant says that it is minimally owed storage fees up to 16 February 2015.[75] The defendant's bases the quantum of its counterclaim on the fixed fees set out in the Service Agreement:[76] S$659,408.64 on a monthly basis, totalling S$5,440,121.28.[77] In addition, the defendant says it is entitled, under the

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74 Defendant's Closing Submissions ("DCS"), para 60.

75 DCS, para 285.

76 Ong's AEIC, paras 90-93.

77 Defence and Counterclaim (Amendment No 1), p 18, para 32(c)-(d).

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variable fees at Appendix C and cl 22 of the Service Agreement, to charge S$601,251.37 for cleaning and waste disposal fees/expenses arising out of the sale of the PME cargo.[78] Thus, the total claimed by the defendant against the plaintiff is S$6,041,372.65.[79]

Issues to be determined

38 It is necessary for me to analyse the plaintiff's case a little more carefully in order to determine exactly the key issues I must decide. There are also other peripheral issues that have been raised and argued at length by both parties in their written closing submissions, such as whether the plaintiff is estopped from bringing these proceedings against the defendant because it had failed to bring a claim in the course of Originating Summons No 100 of 2015 (IBRIS's application for leave to convene a creditors' meeting pursuant to s 210 of the Companies Act (Cap 50, 2006 Rev Ed)) to determine whether the plaintiff or IBRIS had title to the PME cargo, despite leave being granted by the court for the plaintiff to do so. In my view, these are not essential issues to the determination of the dispute. In any event, I find the defendant's arguments on this point to be a non-starter, since the claim brought by the plaintiff against the defendant in these proceedings is quite distinct from any rights that the plaintiff can assert against IBRIS and furthermore, there was no legal compulsion for the plaintiff to have brought up the issue of title to the PME cargo only in proceedings against IBRIS.

39 Coming back to the crux of the dispute, I find that the plaintiff's case

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78 Defence and Counterclaim (Amendment No 1) at pp 18-19, para 32(e); Ong's AEIC, para 94.

79 Ong's AEIC, para 97; Defendant's Opening Statement, para 79.

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that its property has been converted is founded on several planks. As mentioned, the first and fundamental point is that title to the PME cargo continued to be held by the plaintiff *before* the defendant exercised its contractual lien. Hence, the plaintiff argues that title never passed when the batches of PME were delivered to IBRIS and transferred to Tank 1102 at the Banyan Terminal. Alternatively, even if title to the PME had passed, the Storage Agreement executed on 15 October 2014 had the effect of transferring title from IBRIS back to the plaintiff.

40 That the plaintiff held title to the PME cargo is the entire foundation to the plaintiff's case. The plaintiff accepts that, if it fails to cross this first hurdle, its entire case of conversion and/or interference with its property rights by the defendant would collapse, and its claim will be dismissed.

41 Next, according to the plaintiff's case, if the Storage Agreement had the effect of returning title to the PME to the plaintiff, it must go on to show that the defendant did not exercise its contractual lien until *after* 15 October 2014, the date the Storage Agreement was made. This is premised on the assumption that the defendant cannot exercise its lien over any products stored in its tanks, if the products are owned by someone other than the defendant's customer. The validity of this assumption in the context of this case will have to be explored later in this judgment.

42 The next plank of the plaintiff's case is that the defendant could not have exercised its lien until the time the Service Agreement was terminated, that is, 29 November 2014, because that was when the liabilities of IBRIS to the defendant exceeded the value that remained in BG1. That was when the security became insufficient. Alternatively, even if the defendant could have exercised

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its lien prior to 15 October 2014, it did not validly do so because of its failure to give IBRIS prior written notice of its intention to exercise its lien.

43 Thus, from the above, the issues I have to decide may be divided into two broad areas. The first area concerns the question of title to the PME cargo. Two questions must be answered - did title to the PME cargo pass from the plaintiff to IBRIS and if so, when? If title passed, what was the effect of the Storage Agreement?

44 The second area deals with the defendant's contractual right of lien and the consequences flowing thereon. The questions in this area I have to deal with are:

(a) At what point could the defendant have exercised its right of lien? When did it exercise its right of lien? Was it obliged to give notice of the exercise of its right of lien?

(b) At the time when the defendant exercised its lien, would it have made a difference if the title to the PME cargo was with IBRIS or the plaintiff?

45 I shall examine these two broad areas in turn.

Right of possession to the PME cargo

Did title to the PME cargo pass to IBRIS?

46 I deal first with whether the plaintiff had title to the PME cargo. My finding on this point will affect much of the subsequent analysis in this judgment. The initial question which must be addressed is whether and, if so, when title to the PME cargo passed from the plaintiff to IBRIS. The terms of

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the Sale and Purchase Agreement are of limited assistance because they do not specify when title was to pass. The PORAM terms and conditions governing the Sale and Purchase Agreement are silent on this issue.[80] This is accepted by both parties.[81] Where a written contract does not expressly provide for the transfer of title, the general rules as to the passing of title under the Sale of Goods Act (Cap 393, 1999 Rev Ed) (the "SOGA") will apply and it is to this that I now turn.

47 If the contract is for the sale of specific or ascertained goods, property is transferred when it is so intended by the parties (s 17(1) SOGA). In determining the parties' intention, the court may have regard to the contractual terms, the parties' conduct and the circumstances of the case (s 17(2) SOGA). Supplementing this, s 18 of the SOGA sets out the default rules for the passing of title. At the outset, I should highlight that the Sale and Purchase Agreement was a contract to sell unascertained goods. The parties are in agreement on this. The authors of *Benjamin's Sale of Goods* (Sweet & Maxwell, 10th Ed, 2017) at para [5-060] identify three categories of goods which usually fall within this description:

> The first is that of generic goods, that is to say, of a certain quantity of goods in general, without any specific identification of them, such as "50 hogsheads of sugar". The second type is most types of future goods. The third is that of an unascertained part of a larger quantity of ascertained goods, such as "500 tons of wheat out of a cargo of 1,000 tons" on board a certain ship. *The common characteristic seems to be that the goods cannot presently be identified and can be referred to by description only.* [emphasis added]

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80 NE, 12 March 2019, p 30, lines 6-21; 4AB 1615-1619.

81 NE, 12 March 2019, p 30, lines 14-21; Defendants' Reply Closing Submissions ("DRCS"), para 38.

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The plaintiff and IBRIS did not identify a specific 2,000 metric tonnes of PME to be the subject of the Sale and Purchase Agreement. Rather, it was a contract by description. Section 18 r 5 then becomes relevant because it deals with the passing of title in relation to unascertained goods.

> **18.** Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> …
>
> Rule 5.— (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are *unconditionally appropriated* to the contract either by the seller with the assent of the buyer or by the buyer with the *assent* of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.
>
> (2) Where, in pursuance of the contract, the seller *delivers* the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, *and does not reserve the right of disposal*, he is to be taken to have unconditionally appropriated the goods to the contract. …
>
> [emphasis added in italics]

48 In interpreting the language of s 18 r 5, the decision in *Carlos Federspiel & Co S.A. v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240 ("*Carlos Federspiel*") provides helpful guidance (at 255). *Carlos Federspiel* concerned a contract for the sale of bicycles and tricycles. The buyer had paid the contract price and the seller had made preparations for shipment (*eg*, by packing and labelling the goods). However, before the goods were shipped, the seller company was wound up. The buyer argued that the goods had been appropriated to the contract and property had passed. Hence, the goods did not fall within the pool of the company's assets available for distribution to its

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creditors. Pearson J examined the language of s 18 of the Sale of Goods Act 1893 (c 71) (UK), which mirrors the SOGA, and found that for property to pass, three conditions have to be satisfied:

(a) The goods must be unconditionally appropriated. The parties "must have had or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods".

(b) There must be assent. The parties must agree to appropriation and the change of ownership. In some cases, the buyer's assent may be conferred in advance.

(c) The goods must be delivered. This can be either actual or constructive delivery.

49 I pause briefly to note that, although the Court characterised these as three separate conditions, the requirement of delivery is better conceptualised as being subsumed under appropriation. Under s 18 r 5(2), goods may be taken to have been unconditionally appropriated where there has been delivery, either actual or constructive, and the seller does not reserve its right of disposal.

50 On the facts of *Carlos Federspiel*, title to the goods had not passed to the buyer. The Court determined that the parties' intention was that title would only pass upon shipment. Although preparatory steps had been taken by the seller to deliver the goods, this did not amount to an unconditional appropriation. The principles in *Carlos Federspiel* were endorsed and applied locally in *Yap Chin Hock & Anor v Cheng Wang Loong* [1964] MLJ 276.

51 The plaintiff argues that the term "delivery" under s 18 r 5(2) should be taken to mean "full delivery". According to this argument, it was the plaintiff's

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and IBRIS's intention that delivery would only be deemed to be effected when the contractual quantity of 2,000 metric tonnes of PME had been deposited in Tank 1102.[82] It follows that the PME could not have been unconditionally appropriated, and hence passing title to IBRIS, before full delivery took place. At the earliest, title to the PME cargo would only have passed on 17 October 2014, when delivery of all 2,000 metric tonnes of PME was completed.[83]

52 The plaintiff raises two points in advancing its argument. First, the Sale and Purchase Agreement specified that the PME cargo was to be delivered on a "FOB ITT" basis. "FOB" and "ITT" are terms found under Incoterms 2010: International Chamber of Commerce rules for the use of domestic and international trade terms ("Incoterms"). They have specific definitions which, according to the plaintiff, indicate when the parties intended delivery to be effected. The plaintiff relies on the definitions offered in the report of its expert, Mr Mario Johan Nurtanio ("Mr Nurtanio").[84] He is an experienced trader in biodiesel, in particular, PME. He is also a member of the Commercial and Technical Committee of the PORAM and the Executive Committee of the Malaysian Biodiesel Association. Mr Nurtanio considered "FOB", or "free on board", to mean that the seller is only responsible for the goods until they are loaded onto the transportation used for the transaction. "ITT" refers to "in-tank transfer" which means that "the seller will ensure the delivery of the cargo into a tank nominated for the transaction." He went on to observe that if "delivered in batches, the cargo is only considered delivered when the entirety … is

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82 NE, 12 March 2019, p 9, lines 4-11; PCS paras 84, 172.

83 PCS, para 185.

84 Nurtanio's AEIC, MJN-1, pp 25-26.

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delivered". This interpretation is also supported by the evidence of Ms Lim and Mr Choong, the plaintiff's and IBRIS' representatives.[85] So, the plaintiff argues that it was clearly the contracting parties' intention that the inclusion of the term "ITT" was to have the effect of delivery only taking place after actual full delivery of all 2,000 metric tonnes of PME. It adds that the defendant has not substantially challenged its evidence on this point.[86]

53 Secondly, the plaintiff highlights that IBRIS was only obliged to make payment for the PME 30 days "after completion of delivery". It says that such a term can only mean that delivery was intended to take place after the entire contractual quantity had been delivered. To suggest otherwise would mean that there would have been 67 potential "start dates" from which the 30 day credit period would run from.[87] This would fly in the face of commercial reality. In bolstering its argument, the plaintiff also points to the oral evidence of Mr Choong who explained an industry distinction between "delivery" and "acceptance".[88] The PME may have been physically delivered to the Banyan Terminal but this would not have been regarded as delivery for the purpose of appropriating the cargo. Appropriation would only have occurred upon acceptance, on confirmation that the PME was in accordance with the required specifications.

54 In contrast, the defendant argues that there was unconditional appropriation and assent upon the delivery of each truckload of PME. Title

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85 Lim's AEIC, para 22; Choong's AEIC, para 23, 33-35.

86 PCS, para 187.

87 PCS, para 180(e).

88 NE, 14 March 2019, p 33, line 23 to p 34 line 4; p 35 lines 19-25.

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would have passed upon each delivery. Referencing the language of s 18 r 5(2), the defendant asserts that each delivery by the plaintiff to 2 Banyan Place amounted to a delivery of PME "for the purpose of transmission to the buyer". There was an irrevocable attachment of each batch of PME cargo to the contract because the PME was received by IBRIS and was then pumped into Tank 1102, with knowledge of the plaintiff that this was being done. The wording of the Sale and Purchase Agreement did not include a reservation as to the plaintiff's right of disposal for the batches of PME delivered.

55 The parties' objective conduct also shows that delivery was intended to take place upon the arrival of each PME batch. The defendant relies on an email sent on 8 October 2014 from Ms Lim to Mr Choong.[89] In this email, Ms Lim expressed the need for the plaintiff and IBRIS to enter into the Storage Agreement because of the delayed delivery timeline. She requested for an "agreement for the fuels delivered to [IBRIS] tanks and have [IBRIS] return title of the goods delivered to date to [the plaintiff]", which eventually became the Storage Agreement. It was initially Ms Lim's evidence that this choice of wording was intended to disabuse IBRIS of the belief that title had passed from the plaintiff.[90] However, upon further cross-examination, she conceded that the reference to IBRIS returning title meant that title must have already passed to IBRIS from the plaintiff and that she was aware of this.[91] She also accepted that there was a distinction between the term "remain" and "return".[92] When posed similar questions, Mr Choong was evasive in his answers and claimed to

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89 1AB 60.

90 NE, 13 March 2019, p 33, lines 18-22.

91 NE, 13 March 2019, p 43 line 24 to p 44 line 8.

92 NE, 13 March 2019, p 30, line 11 to p 31, line 3.

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understand "return" to mean title would "remain" with the plaintiff.[93] He then added that he was unsure as to what the legal position on title was. Taken together, the defendant argues that both IBRIS and the plaintiff knew, or must have known, that title had passed upon the delivery of each batch of PME.

56 The defendant also refutes the plaintiff's arguments as to the significance of the term "ITT" in the Sale and Purchase Agreement. It argues that "ITT" simply refers to the manner in which the PME cargo had to be physically delivered. Incoterms do not deal with the "transfer of ownership of the goods, or the consequences of a breach of contract".[94] This was conceded by Ms Lim during the trial after she was referred to the Incoterms.[95] In any event, the defendant submits that the subjective understanding of Ms Lim and Mr Choong as to the meaning of "ITT" or the significance of Incoterms is irrelevant.

57 Having assessed the evidence and the submissions, I find that there was an unconditional appropriation of the PME upon each batch of delivery and this was assented to by the parties. Title to the goods thus passed from the plaintiff to IBRIS up until 15 October 2014, the date of the Storage Agreement. I shall discuss the significance of the Storage Agreement in relation to the passing of title later in this judgment. The delivery documents[96] detailing the 67 deliveries to 2 Banyan Place specify the date of delivery, the quantity of PME delivered and references the contract number. These deliveries of PME were then pumped

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93 NE, 14 March 2019, p 52, lines 9-14.

94 NE, 13 March 2019, p 46 line 19 to p 47 line 1; DCS, para 83.

95 NE, 13 March 2019, p 48, lines 3-11.

96 3AB 928-1450.

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into Tank 1102, which was for the IBRIS's exclusive use. As can be seen by the terms of the Storage Agreement, the plaintiff was well aware that the PME was being stored in Tank 1102. In my judgment, this demonstrates an intention to attach those specific quantities of PME to the Sale and Purchase Agreement. The plaintiff did not withhold any documentation, which would have qualified IBRIS's possession of the goods. The steps taken by the plaintiff in delivering the PME were irrevocable. In fact, IBRIS was free to sell the PME cargo to BP, as it had intended, and move the PME cargo out of Tank 1102 immediately for that purpose. This is quite unlike the seller in *Carlos Federspiel* who still had the option to refuse to ship the goods to the buyer.

58 I accept the defendant's submissions that the parties' conduct indicates that they assented to the appropriation of the PME cargo upon each delivery. Besides her references to IBRIS "return[ing] title" to the plaintiff, it is also relevant that an invoice was issued by the plaintiff to IBRIS on 26 September 2014 asking for payment before the credit period had even started (see [18] above). In her oral evidence, Ms Lim characterised this as an attempt to obtain a goodwill payment from IBRIS and to reduce the plaintiff's exposure. The plaintiff was trying its luck and, hoping that IBRIS would make payment before it was due.[97] This was apparently not unusual practice in their industry.[98] Nonetheless, it is notable that this attempt to collect payment was not met with any protest by IBRIS. The issuance of an invoice is not reflective of a casual attempt at getting paid. Faced with unforeseen delays in delivery and IBRIS's cash flow issues, the plaintiff's behaviour reflects that of a nervous seller trying

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97 NE, 13 March 2019, p 23, lines 17-21.

98 NE, 14 March 2019, p 39, lines 13-17.

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to avert potential losses by seeking payment as early as possible. The plaintiff would only have taken such steps if it was of the belief that it could no longer assert title over the delivered PME cargo.

59 The terms "FOB" and "ITT" do not make it clear that appropriation would only occur upon delivery of the full contractual amount of 2,000 metric tonnes of PME. These terms do not relate to when title passes but only address the method and means of delivery. Similarly, the requirement for IBRIS to make payment 30 days after delivery does not definitively support the plaintiff's case. A distinction should be drawn between delivery for the purpose of calculating the date of payment to determine a fixed starting point from which IBRIS's credit term would run, and delivery for the purpose of appropriating the goods to the contract. The latter simply requires a transmission of the goods to the buyer, without any reservation of any right of disposal by the seller. This could have occurred without triggering IBRIS's payment obligations, which I find was 30 days after the full completion of the full delivery of the PME cargo, based on the terms of the Sale and Purchase Agreement.

60 I also agree with the defendant that the expressions of the parties' subjective intentions are of limited assistance in determining when title was to pass. Although Ms Lim and Mr Choong were responsible for negotiating the Sale and Purchase Agreement and would have been privy to the intentions of their companies, it is the objective evidence in the form of communications that passed between the plaintiff and IBRIS that are relevant. Further, their evidence was premised on their general understanding as commodity traders in the market. A useful illustration of this is the distinction drawn by Mr Choong between "delivery" and "acceptance". This is not a legal distinction found under s 18 of the SOGA. Moreover, taking into account the concessions made

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by Ms Lim in relation to her 8 October 2014 email to Mr Choong and what I find is the significance of the term "ITT", it is uncertain whether her views actually accurately reflect the plaintiff's position at the material time.

The effect of the Storage Agreement

61 Given my finding that title to the PME passed to IBRIS upon each delivery, the next issue is whether the Storage Agreement successfully passed title back to the plaintiff.

62 The plaintiff argues that cl 8 of the Storage Agreement (see [19] above) has a two-fold purpose.[99] First, if title to the PME had not passed, cl 8 would ensure that the plaintiff would continue to hold title until all of the debts owed by IBRIS are fully settled.[100] Title was to remain with the plaintiff even after the completion of delivery on 17 October 2014. I have already found that title passed upon each delivery of the PME cargo. As such, this argument is only relevant in respect of the PME which was undelivered at the date of the Storage Agreement's execution. Secondly, if title passed to IBRIS upon each delivery, it was the intention of the parties to use cl 8 as a means to transfer title to the delivered PME back to the plaintiff.[101] It is contended that the plain words of cl 8 support such an interpretation. The plaintiff also relies on emails sent between the parties on 8 October 2014 to illustrate that this was the parties' intention. Besides the email sent from Ms Lim to Mr Choong (see above at [55]), the plaintiff also refers to correspondence from the plaintiff's Ms Mabel Loh ("Ms

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99 Reply and Defence to Counterclaim (Amendment No 2), para 12(d)(iv).

100 Lim's AEIC, para 52.

101 PCS, para 88.

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Loh") to Mr Choong which stated that title "shall not pass to [IBRIS] until all debts owed to [the plaintiff] by [IBRIS] are fully paid and settled".[102] So, it was argued that the objective of the parties was clearly that title to the PME cargo would remain with the plaintiff at all times, but if title passed, the Storage Agreement would have had the effect of returning title to achieve this desired outcome. In the alternative, the plaintiff submits that the emails sent by Ms Loh and Ms Lim on 8 October 2014 and Mr Choong's response to both emails, appearing to accept the terms set out therein, constitute a valid and binding agreement to return title to the PME to the plaintiff.[103]

63 The defendant's position is that, at best, cl 8 of the Storage Agreement only served to retain title to the remaining undelivered portion of the PME cargo of 21.30 metric tonnes as at 15 October 2014.[104] This is because cl 8 only purports to retain title and does not address the re-conveyance of title back to the plaintiff. The defendant argues that adopting the plaintiff's position would be tantamount to rewriting the terms of the Storage Agreement.

64 The law on the interpretation of contractual terms is not controversial. The Court of Appeal in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") at [30] summarised the principles expressed in *Y.E.S F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* ("*Soup Restaurant*") [2015] 5 SLR 1187 on contractual interpretation. The Court of Appeal explained that the purpose of interpretation is to give effect to the objectively ascertained expressed intentions

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102 1AB 62.

103 PCS, para 217-218.

104 DCS, para 101.

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of the contracting parties as it emerges from the contextual meaning of the relevant contractual language. While both the text of the agreement and the surrounding context must be considered, the written agreement is of first and primary importance. Extrinsic evidence is admissible so long as it is "relevant", "reasonably available to all the contracting parties" and relates to a "clear or obvious context" (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [125], [132]). Such evidence must go towards proving what the parties *objectively* agreed upon (*Zurich Insurance* at [132(d)]). Evidence of the subjective intentions of the parties is not relevant (*Yap Son On* at [30] and *Soup Restaurant* at [33]). An exception to this is where there is latent ambiguity in the written agreement (*Zurich Insurance* at [50]).

65 In my judgment, the wording of cl 8 is clear. It directed that title and property to the PME "shall not pass" until the IBRIS settled its debts. The plain and ordinary reading of this is that the plaintiff was to retain title to the PME cargo which had not already passed to IBRIS as of 15 October 2014. There is nothing to suggest that the phrase "shall not pass", which is drafted in the future tense, should also apply to title to the PME cargo which has already passed to IBRIS. The plaintiff's contended interpretation grants cl 8 a retroactive effect which cannot be discerned from the clause's wording. If the plaintiff's intention had been to use the Storage Agreement as a means by which to also re-convey title, this could easily have been expressed in the language of the Storage Agreement. The fact that this was not done strengthens the conclusion that cl 8 was not intended to have such an expansive meaning. Ms Lim, the plaintiff's representative, appreciated the distinction between the "return" of title and for

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title to "remain"[105] and reflected this in her email correspondence to IBRIS which was a precursor to the Storage Agreement. Why then was this distinction not captured in the wording of the Storage Agreement itself?

66 In any event, I find that the emails sent on 8 October 2014 are not relevant for the purposes of interpreting the scope of cl 8. These emails point to the *subjective* intentions of the plaintiff and IBRIS. The background context of the parties' discussions should not be used to create ambiguity as to the meaning of the Storage Agreement where none exists (*Soup Restaurant* at [32]). I also do not accept that these emails amounted to a binding agreement. If an earlier agreement had been concluded on 8 October 2014, with terms as to the return of title being clearly articulated, there would have been no purpose in executing the Storage Agreement. The fact that the plaintiff and IBRIS concluded the Storage Agreement suggests that they intended for it to govern their contractual relationship. I should also add that the plaintiff has not pleaded the existence of an agreement concluded by way of the 8 October 2014 emails.[106]

67 Of greater significance is the objective conduct of the parties with respect to the Storage Agreement. The Storage Agreement was backdated to 1 September 2014, before the first delivery of PME to the Banyan Terminal. When asked about why this was done, Ms Lim explained that this was an "internal agreement with management … to just make it clean to go right to the start".[107] I will make two observations here.

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105 NE, 13 March 2019, p 30, line 11 to p 31, line 3.

106 DRCS, para 71.

107 NE, 13 March 2019, p 108 line 10 to p 109 line 3.

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68 First, I find that the plaintiff and IBRIS must have been trying to create a misleading impression to third parties, such as the defendant, that the Storage Agreement backdated to 1 September 2014 governed their relationship *from the beginning*. Hence, cl 8 refers to the whole of the PME cargo as if no part of it had already been delivered. Also, the plaintiff later sent the Storage Agreement to the defendant claiming that it was the basis of its right to ownership and possession over the entire PME cargo, without explaining that it has been signed at a time when almost all of the PME cargo has been delivered into Tank 1102 (see above at [26]).

69 Second, if it was clear to the parties that title to the PME cargo would only pass upon complete delivery, there would have been no need to backdate the Storage Agreement. The backdating of the Storage Agreement suggests that the parties knew, or at least believed, that title to the delivered PME had already passed, and they were attempting to re-write history. The decision of the plaintiff to enter into the Storage Agreement suggests to me that the plaintiff was seeking a way by which it could create an interest over the PME cargo to secure payment of what was due by IBRIS.

70 Bearing this in mind, it becomes clear that the plaintiff wanted the best of both worlds. It knew that title to each batch of PME cargo passed upon delivery to IBRIS. This presented a problem since IBRIS was clearly in financial difficulty. To protect its interests, the plaintiff sought to reclaim title to the delivered PME by way of the Storage Agreement but without conceding that title to the delivered PME had already passed. By backdating the Storage Agreement, the plaintiff attempted to create a fiction that this arrangement operated over the whole PME cargo. This explains why cl 8 is drafted as it was, that is, to simply retain title.

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71 In my judgment, cl 8 has the effect of a retention of title clause. The scope of cl 8 does not provide for the return of title, which already passed to IBRIS, back to the plaintiff. The Storage Agreement only had the effect of ensuring that the plaintiff retained title to the undelivered PME as at 15 October 2014, which was the last batch of 21.30 metric tonnes that was delivered on 17 October 2014.

72 Given my findings as to when title to the PME cargo passed, the plaintiff accepts that its case that the defendant has converted its property or wrongfully interfered with its property rights in respect of the PME cargo, which title had already passed to IBRIS by 15 October 2014, will necessarily fail.[108] This is how the plaintiff has mounted its case in these proceedings.

73 I will proceed to consider the exercise of the defendant's lien in respect of the PME cargo that was still owned by the plaintiff by virtue of cl 8 of the Storage Agreement.

The defendant's lien

74 Before considering the exercise of the defendant's lien, I make some preliminary observations as to the nature of the lien itself. The defendant argues that cl 20 of the Service Agreement provides the defendant with a possessory legal interest in the PME cargo, as shown by the wording of the clause and the objective intention of the parties.[109] A general possessory lien refers to a right to "retain possession of goods or documents belonging to another until all

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108 PCS, para 109.

109 DCS, para 181.

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claims against that other are satisfied" (Alfred H Silvertown, *The Law of Lien* (Butterworths, 1st Ed, 1988)) at p 19.

75 The lien under cl 20 creates an interest in favour of the defendant that is not the same as that in *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 ("*Diablo*"). There, the Court of Appeal considered the nature of a contractual lien over sub-freights. The appellant, ("the Owner"), owned a vessel which it chartered out to a company ("the Company"). Cl 18 of the bareboat charter provided the Owner with a lien as follows (at [10]):

> … [the Owner] to have a lien upon all cargoes, sub-hires and sub-freights belonging or due to [the Company] or any sub-charterers and any Bill of Lading freight for all claims under this Charter, and [the Company] to have a lien on the Vessel for all moneys paid in advance and not earned.

The Company went on to sub-charter the vessel. Sometime later, the Company incurred substantial losses and its directors filed a winding up application. Upon being notified of this, the Owner sought to exercise, pursuant to cl 18, a lien on the sub-freights due from the sub-charterer to the Company.

76 The Court of Appeal observed that it is a well-established position in English law that liens on sub-freights give rise to an "equitable assignment by way of floating charge" (at [35]). Such liens assign future choses in action and the ship-owner has a dormant right to the sub-freights when they come into existence. The shipowner holds no proprietary interest "until sums due under the charter go unpaid" (at [37]). The Court of Appeal endorsed the definition of a floating charge (at [38]) as set out in *In re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 at 295:

(a) it is a charge on a class of present and future assets of a company;

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(b) this class of assets would, in the ordinary course of business, "be changing from time to time"; and

(c) until a future step is taken by those interested in the charge, the company may carry on business in the ordinary way.

77 In determining whether rights conferred should be characterised as floating charges, the Court of Appeal in *Diablo* articulated a two-step approach. First, identify the rights conferred under the security and second, determine the appropriate legal characterisation of these rights (at [57]). The court should place emphasis on the substance of the security, rather than the form. A floating charge may be created without express reference to the expressions "present or future property" or "undertaking" (citing *Re Lin Securities (Pte) Ltd; Chi Man Kwong Peter and others v Asia Commercial Bank and others* [1988] 1 SLR(R) 220 at [24]). On the facts, the Court of Appeal accepted that cl 18 created a floating charge (at [58]). The equitable assignment of security under cl 18 was not absolute and the Company was free to deal with the sub-freights for its own business operations prior to the Owner giving notice of its exercise of the lien. Since the lien had not been registered, it was void against the Company's liquidators and creditors.

78 In this case, cl 20 simply provides for a right of lien and retention over products stored by IBRIS with the defendant. This is complemented by the right of disposal under cl 22. In contrast with the case of *Diablo*, cl 20 contemplates the defendant exercising its rights of control over products already *in its possession*. Unlike a floating charge, the defendant would not be able to exercise its security interest over the products unless they were already stored in the tanks at the Banyan Terminal.

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79 The nature of the defendant's interest is more akin to the lien in *Great Eastern Railway Company v Lord's Trustee* [1909] AC 109 ("*Great Eastern Railway*"). That case involved a coal merchant ("Lord") who opened a credit account with a railway company by way of a "ledger agreement" for the carriage of his coal. The relevant clause of the ledger agreement provided the railway company with:

> …a continual lien upon all waggons, goods, minerals, articles and *things hauled or conveyed on their lines*, or which shall be at any time upon the railway or *upon any ground allotted by or rented of the company* for all tolls, rates, charges and moneys which shall be or become due or payable to the company…and the company to be at liberty from time to time and in such manner as they shall think fit, to sell and dispose of all or any of such waggons, goods, minerals, articles and things in order to satisfy any such lien. [emphasis added]

Lord fell into arrears and the railway company closed the credit account. It also shut the gates of its yard, preventing Lord from removing coal on his allotments. The dispute before the House of Lords concerned the nature of the railway company's interest. The railway company argued that the ledger agreement was not void for registration as a bill of sale; its interest "was not an equitable right to take possession, but a common law right to *retain a possession* with which they had never parted" [emphasis added] (at 111). The House of Lords agreed. There was already possession at law and the ledger agreement merely gave the railway company a right to retain, coupled with an authority to sell, the coal in its yard (at 113, 115). It was inconsequential that Lord had previously been able to enter the yard and freely remove coal (at 112). While Lord may have retained possession in one sense, the railway company's right to the coal was not dormant (unlike the Owner's right to sub-freights in *Diablo*). Its lien was operative over the coal so long as it remained in the yard (at 115).

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80 Similarly, in our case, the PME cargo was subject to the defendant's right of lien only while stored at the Banyan Terminal and in its possession. While IBRIS remained free to move the PME cargo out of Tank 1102 in the ordinary course of business, the lien could be exercised by the defendant when the contractually agreed conditions were triggered. This differentiates the defendant's interest from a floating charge which creates a security interest in favour of the chargee over assets that may not even be in its possession, and which some step has to be taken to crystallise the chargee's proprietary interest in or possessory right over the charged assets. In my view, a possessory lien is conceptually quite distinct from a security interest created by a floating charge.

81 With these observations in mind, I move on now to consider the defendant's purported exercise of the lien.

When could the defendant have exercised its right of lien?

82 On the plaintiff's case, the date on which the defendant exercised its lien is critical to the plaintiff's remaining claim in conversion.[110] If the defendant validly exercised its lien to retain the PME cargo before the Storage Agreement was executed on 15 October 2014, then, according to the plaintiff, its claim for conversion of the 21.30 metric tonnes of the PME cargo delivered on 17 October 2014 would fail. The plaintiff argues that the right of lien was not triggered and the defendant could not have exercised the lien over the PME cargo until much later in November 2014. It premises this argument on the language of cl 20 (see [10] above). The defendant's right of lien would only have been triggered if there had been an "insufficiency of security". Insufficiency is measured by

110 PCS, para 91.

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whether BG1 had enough credit to pay the amounts due and owing to the defendant, that is, its outstanding liabilities. The BGs were not intended to cover future sums payable. This was conceded by the defendant's commercial manager, Ms Ong Saw Wah Susie ("Ms Ong").[111]

83 It is the plaintiff's case that, as of 18 October 2014, there was still about S$3.5m available to be drawn on BG1. This was more than sufficient to cover the outstanding charges until the termination of the Service Agreement on 29 November 2014. Ms Ong also accepted that, in a scenario where BG1 was sufficient to cover a claim, a failure to provide BG2 would not trigger the defendant's right to "activate the lien".[112] The plaintiff contends that, at the very earliest, BG1 would only have become potentially insufficient on 20 October 2014, when the defendant demanded payment for an estimated amount due of S$16,151,272.[113] But, even then, the plaintiff argues that this estimated sum would only have become due and payable on 29 November 2014. Cl 26.3 of the Service Agreement states that, in the event of the Service Agreement's termination, "any sum due … or any sum expressly agreed to be payable … shall immediately become due and payable". The defendant therefore cannot assert that there was an actual insufficiency of security until the Service Agreement was terminated on 29 November 2014.

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111 NE, 16 April 2019, p 109, lines 12-16.

112 NE, 16 April 2019, p 121 line 19 to p 122 line 21.

113 PCS, para 240.

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84 On the other hand, the defendant argues that there would have been an insufficiency of security, triggering its right to exercise the lien under cl 20, in any of three situations:[114]

(a) if IBRIS's outstanding liabilities exceeded the amount of BG1;

(b) if IBRIS failed to furnish security in the form of BG1 and BG2 by the contractually stipulated deadlines; or

(c) if IBRIS failed to maintain the amount of BG1 as required by cl 39.3.

85 Thus, according to the defendant, IBRIS's failure to produce BG2 by its extended deadline of 31 August 2014, amounted to insufficient security as of 1 September 2014. The right of lien under cl 20 would have been triggered and the defendant was entitled to exercise this lien over the goods in its possession or those which subsequently came into its possession. The plaintiff's interpretation of sufficient security, reflected at [83], is too narrow and does not reflect the intentions of the parties at the time when the Service Agreement was entered into. The defendant points to the wording of cl 20 which provides for a lien to secure "all … sums payable" to "discharge … all liabilities". This indicates that the lien was intended to cover even sums which had yet to fall due under the Service Agreement.

86 The defendant points out that the right of lien was to ensure that the defendant would have sufficient security for the *entire* duration of the Service Agreement. This is supported by the original wording of cl 39.1 which included

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114 DCS, para 202.

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the option of IBRIS providing a higher amount of security, S$8,250,000, in exchange for the need to provide a bank guarantee under cl 20. This also explains the context behind cl 39's variation on 29 November 2012.[115] On 11 September 2012, IBRIS provided a bank guarantee pursuant to cl 39.1(2) for the sum of S$5,625,000 which was intended to last for the rest of the Service Agreement, that is, up to July 2016. However, it transpired that this bank guarantee was only valid for a period of seven months. IBRIS faced difficulties in obtaining a bank guarantee to cover such a long period of time. The defendant agreed to amend cl 39.1 such that IBRIS would provide BG1 and BG2. The modified arrangement was intended to ensure that IBRIS would be able to supply security throughout the Service Agreement. IBRIS' failure to provide BG2 frustrated this objective. According to the defendant, adopting the plaintiff's interpretation of insufficiency would nullify IBRIS' contractual obligations to provide BG2 on time.[116]

87 The defendant also argues that its correspondence with IBRIS showed that IBRIS was also aware that the failure to provide BG2 would trigger the lien under cl 20. On 22 May 2014, the defendant informed IBRIS of the impending deadline for BG2 and added that a failure to provide BG2 would result in the "product in the tanks [being] seized … due to [an] insufficiency of the BG".[117] This was not met with any objection by IBRIS. In any event, the defendant submits that its right to exercise its lien would have arisen at the latest as of 29

115 DCS, para 213.

116 DRCS, para 87.

117 2AB 724.

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November 2014 pursuant to cl 2.3 read with cl 26.3(2) of the Service Agreement.

88 In my judgment, on a proper interpretation of the relevant terms, there was only an insufficiency of security on 29 November 2014, which is when the Service Agreement was terminated. There is no suggestion from the clear and unambiguous wording of cl 20 that the references to the sums payable and liabilities owed by IBRIS were meant to refer to existing *and* future obligations. The defendant's reference to the underlying commercial intent of having two bank guarantees instead of one is relevant because it shows the underlying contextual background, but it does not clearly show that parties would have considered the defendant to have insufficient security once BG2 was not provided by the contractual deadline of 29 May 2014, if there continued to be enough credit on BG1.

89 When IBRIS failed to provide BG2 in accordance with the timeline set out under cl 39, the defendant gave IBRIS extensions of time to provide adequate security. It did not immediately exercise the lien but only informed IBRIS that the continued failure to provide security would lead to such an eventuality. At that time, BG1 was still valid. The parties' conduct suggests that the defendant believed that BG1 was sufficient security pending the receipt of BG2. As conceded by Ms Ong, IBRIS's liabilities had not then exceeded the outstanding value on BG1. Thus, there would have been less urgency for the defendant to have required BG2 to be delivered immediately.

90 Ms Ong's evidence also made it clear that the letter sent on 20 October 2014 quantifying the sums owed by IBRIS was only an estimate of the amounts that would become due from IBRIS. A confirmed figure was to follow. On the

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evidence before me, I find that there was no debt due from IBRIS at that point of time that exceeded BG1, which would render it insufficient. It was only upon the termination of the Service Agreement that all of IBRIS's obligations became due and owing, including the accelerated payments which would have been due up to July 2016. It was at this point that BG1 would have clearly been insufficient to cover the sums owed to the defendant. It was only then that the defendant have been able to exercise its lien under cl 20.

91 I should add that this appears consistent with the evidence that surprisingly emerged only during the cross-examination of Ms Ong that IBRIS had been permitted to discharge about 9,500 metric tonnes of a biodiesel product from Tank 1104 on *14 September 2014* and about 4,300 metric tonnes of another biodiesel product from Tank 1106 on *25 October 2014*.[118] While Ms Ong claimed that such discharges of stored products from the tanks were commercial decisions made by the defendant, there was no documentary evidence produced the defendant which supported this assertion. As such, on the evidence, I find that the defendant's own conduct suggests that it was aware that its lien over the products stored by the defendant in the tanks at the Banyan Terminal would not arise until the termination of the Service Agreement on 29 November 2014.

Notice of exercise

92 Another area of dispute is whether the defendant was required to give notice of the exercise of its lien. According to the plaintiff's case, this is relevant to whether the defendant had exercised its right of lien over the PME cargo in its possession *before* the Storage Agreement was executed on 15 October 2014.

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118 NE, 16 April 2019, pp 45-47.

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The plaintiff submits that the defendant was obliged to give prior notice of its exercise and relies on the post-contractual conduct of the defendant to support this point. On 25 July 2014, the defendant gave express notice to IBRIS as to the potential exercise of its lien. This letter was sent by Mr Gilbert Liu ("Mr Liu"), the defendant's regional legal counsel. This was followed by the express "de-activation" of the lien on 30 July 2014. Subsequently, in its email on 12 September 2014, the defendant clearly informed IBRIS that it was considering the "activation" of the lien. According to the plaintiff, these examples suggest that the defendant recognised the necessity of giving notice and that there was a common understanding between the parties on this point.

93 The plaintiff submits that this is also in line with commercial reasoning. It would be unrealistic for IBRIS to have a lien sprung on it without notice. Ms Ong accepted that it was "reasonable and commercially necessary for [the defendant] to give notice [to IBRIS]".[119] The plaintiff adds that, even if the Service Agreement is silent as to whether notice was required, it was an implied term that the defendant would exercise the lien by giving prior written notice to IBRIS.[120] Given that the defendant did not give prior notice of the exercise of its lien, IBRIS was able to pass back title to the plaintiff via the Storage Agreement executed on 15 October 2014.

94 In response, the defendant argues that there is no express provision under the Service Agreement requiring the defendant to provide notice of the exercise of its lien.[121] The plaintiff's interpretation is not supported by a plain

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119 NE, 17 April 2019, p 16, lines 16-21.

120 PCS, para 263.

121 DCS, para 239; DRCS, para 122.

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and ordinary reading of cl(l) 20 and 39. The wording of cl 20 provides that it is only triggered by the insufficiency of security or if the security provided is invalid.[122] No other explicit conditions are attached. This is unlike other provisions in the Service Agreement. One example is cl 2.3 which expressly states that the contracting parties may terminate the agreement by giving not less than three months' *notice*, which was then later varied by the parties to 45 days.[123] The plaintiff's reliance on post-contractual correspondence between IBRIS and the defendant to demonstrate that notice was required is tantamount to rewriting the contract. The defendant wrote to IBRIS in July and September not because it felt compelled to give notice but only out of goodwill. It notified IBRIS of the consequences if it failed to provide BG2 only out of courtesy.[124] This does not mean a requirement of notice should be implied into the wording of the Service Agreement.

95 I have already outlined the general approach towards contractual interpretation (see [64] above). Nevertheless, it is helpful to highlight the specific guidance by the Court of Appeal in respect of the admissibility of post-contractual conduct. This was a point directly addressed in *Zurich Insurance* at [132(d)]. The Court held that there is no "absolute or rigid prohibition" against its admissibility. However, in the normal case, it is likely that evidence of prior negotiations and subsequent conduct would not be relevant, reasonably available to the contracting parties or relate to a clear obvious context, rendering it inadmissible. The position in *Zurich Insurance* was summarised by the Court

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122 DCS, para 240.

123 1AB 125, 218.

124 NE, 17 April 2019, p 11, lines 9-19.

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in its subsequent decision, *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 ("*Sports Connection*") at [70]. Evidence of post-contractual conduct is likely to be inadmissible where:

> a party attempts to trawl through evidence in an attempt to favour its subjective interpretations of the contract and/or where a party attempts to persuade the court to adopt a different interpretation from that suggested by the plain language of the contract in a situation where the context of the contract concerned is *not* clear and obvious. [emphasis in original]

The Court in *Sports Connection* also reiterated the observation made in *Zurich Insurance* that the relevance of subsequent conduct "remains a controversial and evolving topic that will require more extensive scrutiny … at a more appropriate juncture" (*Zurich Insurance* at [132(d)]; *Sports Connection* at [71]).

96 On the point of implication of contractual terms, the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") characterised the process of implying terms as a means of giving effect to the presumed intentions of the parties by filling gaps in the contract (at [93]). It also laid down a three step process to determine when implication is necessary (at [101]):

(a) The court should first ascertain whether there is a gap in the contract which can be remedied by implication. It will only be appropriate for the court to imply a term where the parties did not contemplate that there would be a gap at all. This is opposed to a situation where the parties contemplated the unaddressed issue but chose not to provide a term for it or were unable to agree on a term to resolve the issue.

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(b) The court must then consider whether it is necessary in the business or commercial sense to imply the term to give the contract efficacy – the "business efficacy" test.

(c) Finally, the court has to apply the "official bystander" test. The suggested term must have been so obvious to the parties that if it had been suggested at the time of contracting, they would have agreed to such a term immediately.

The "business efficacy" test and the "official bystander" test are to be used in conjunction and complementarily. The implied term should also be reasonable, equitable, capable of clear expression and must not contradict any express term of the contract (at [98]). Terms are not to be implied into contracts lightly, it must be done only when it is necessary to do so (at [98], [100]).

97 I am persuaded that the post-contractual of the defendant is relevant in determining whether cl 20 required the defendant to give notice that it was exercising its lien. *Zurich Insurance* and *Sports Connection* highlight that the relevance of post-contractual conduct remains a contentious area of law. This point was more recently restated by the Court of Appeal in *Simpson Marine (SEA) Pte Ltd v Jaicipto Jiaravanon* [2019] 1 SLR 696 at [78]. The courts are not foreclosed from considering such evidence although a decision either way is likely to be fact specific. One example of where conduct was relevant is set out in the Court of Appeal's decision in *Ngee Ann Development Pte Ltd v Takashimaya Singapore Ltd* [2017] 2 SLR 627, a case cited by the plaintiff in its submissions.

98 Ngee Ann Development commenced proceedings against Takashimaya, the lessor of commercial space in the shopping centre, Ngee Ann City. The

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parties' dispute concerned the method of valuation of the space being leased by Takashimaya. Prior to the commencement of proceedings, parties had agreed to conduct two rent reviews in 2003 and 2008. The objective of these reviews was to determine the prevailing market value. The new rent would then be calculated based on this figure. The Court found that the rent reviews agreed upon by the parties were relevant in determining the parties' understanding of how valuation was to be carried out. The reviews provided a "useful and contemporaneous analogue to the present situation, … they provide an insight into the parties' understanding of how the 'prevailing market value' of the Demised Premises has been and is to be determined moving forward" (at [86]).

99 The wording of cl 20 is silent on notice. It provides that the defendant "shall have a right of lien" but does not specify whether a requirement of notice is attached to this right. In such circumstances, it is helpful to consider the post-contractual dealings of the parties, particularly since IBRIS failed to supply security on multiple occasions. The defendant's correspondence with IBRIS previews what it would have done if it were about to exercise its right of lien. That being said, the language used by the defendant in this correspondence does not indicate that it regarded itself as being under an obligation of giving formal written notice before it could exercise its lien. The letter sent by Mr Liu on 25 July 2014 informed IBRIS that the defendant had no choice "but to exercise the right of lien under the Service Agreement". This suggests that the defendant was merely communicating its intended course of action to IBRIS, rather than providing it with formal notice. Similarly, the objective of the email dated 12 September 2014 was to inform IBRIS that the lien could be exercised if BG2 was not submitted. There is no reference to a notice period. When analysed from this perspective, the defendant's conduct does not point to a requirement of notice.

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100 While the plaintiff argues that there are good commercial reasons why the defendant should have given notice, there are also commercial considerations as to why notice does not need to be given. By providing IBRIS with reasonable notice as to when the lien would be exercised, IBRIS would have had the opportunity to remove the PME cargo from Tank 1102 and circumvent the effects of cl 20.[125]

101 I also find that no requirement of notice should be implied into cl 20. *Sembcorp Marine* articulates the high threshold parties have to meet before the court will consider contractual implication of terms. In my view, this threshold has not been met. IBRIS and the defendant were commercial parties and it is fair to assume that the unqualified provision of a "right of lien" in cl 20 was intentional. I do not think that it is *necessary* to imply a requirement of notice to give the Service Agreement business efficacy. Quite the contrary, if the defendant was required to give prior written notice before the lien can be exercised, it might defeat the whole purpose of having a lien because IBRIS could simply remove its products that are stored in the tanks.

102 Operationally, it also makes no sense for the defendant to be required to give advance notice before it can exercise its lien over any stored products. This is because a customer already has to give the defendant seven to ten days' notice of its intention to remove any products stored in the tanks.[126] The defendant then simply has to decide, if its right of lien has already arisen, whether to comply with such instructions for the removal of the stored products. Its act of refusal to comply with any such instruction is the exercise of its lien.

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125 Ong's supplementary AEIC, para 5.

126 NE, 17 April 2019, p 12, lines 8-12.

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103 For these reasons set out above, I do not accept that the plaintiff's submission that the defendant was required to give clear and express notice of the exercise of its lien.

Time of exercise

104 This issue of the time when the lien was exercised can be dealt with shortly.

105 The defendant's position is that it informed IBRIS of its intention to retain possession of the PME cargo in Tank 1102 in its email sent on 12 September 2014.[127] By retaining possession thereafter, this amounted to an exercise of the defendant's lien over each batch of PME upon its delivery to the Banyan Terminal up until the point of disposal.[128]

106 The wording of the 12 September email does not support the defendant's assertions. All that was communicated to the IBRIS was the possibility that the defendant might "activate" its lien if BG2 was not supplied. This does not amount to a communication that the defendant was intending to retain possession of the PME cargo. It was only a possibility, contingent on whether IBRIS complied with the defendant's instructions. This does not amount to an exercise of the lien. In any case, as I have found, the right of lien only arose on 29 November 2014 and the defendant would not have been able to validly exercise it prior to that date. I find that the defendant could have exercised its right of lien upon the termination of the Service Agreement on 29 November

127 1AB 40.

128 DCS, para 235.

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2014, at the same time when the right arose. As I have found above, no prior notice of any exercise was required from the defendant.

107 I should add that the act of the defendant refusing to take any instructions from IBRIS, if such had been given, for the removal of the PME cargo would have been an exercise of its contractual lien. In this case, there was no evidence that there was any attempt by IBRIS to remove the PME cargo. The instructions instead came from the plaintiff, via its solicitor's letter, asserting its right to possession of the PME cargo in its letter of 16 February 2015. By then, the defendant's right of lien had arisen and its refusal to comply with the letter was an exercise of its lien over the PME cargo.

What if the plaintiff held title to the PME?

108 Finally, I consider whether the foregoing analysis would differ if the plaintiff, as opposed to IBRIS, had held title to the PME cargo at the time when the defendant's right to exercise its lien arose. This analysis is in any event necessary since I have found that the plaintiff retained title to 21.30 metric tonnes of the PME delivered on 17 October 2014 after the execution of the Storage Agreement. The defendant argues that its lien could still be validly exercised over the PME cargo because the plaintiff consented to and authorised the storage of the PME cargo at the Banyan Terminal.[129] More specifically, the defendant argues that IBRIS had implied actual authority or apparent authority to do so. Counsel for the plaintiff raised concerns at the hearing that this argument had not been pleaded by the defendant.[130] I disagree. The defence

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129 DCS, para 121.

130 NE, 12 March 2019, p 22, lines 3-8.

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and counterclaim makes several reference to the fact that the plaintiff "authorised and consented to" IBRIS storing the PME cargo with the defendant.[131]

109 The law on agency is well established. For present purposes it is sufficient to reiterate a few key principles. Actual authority refers to a legal relationship generated by way of a consensual agreement between a principal and his agent (*Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd and another* [1965] 2 QB 480 ("*Freeman & Lockyer*") at p 502). This authority may either be express or implied, *ie*, it is inferred from the conduct of the parties and the circumstances of the case. Apparent authority refers to the legal relationship between the principal and a contractor created by a representation by the former that his agent has authority to enter on behalf of the principal into a contract (*Freeman & Lockyer* at p 503). Although there is some disagreement over the theoretical basis for apparent authority (Tan Cheng Han SC, *The Law of Agency,* (Singapore Academy of Law: Academy Publishing, 2010) ("*The Law of Agency*") at para [05.005]), the predominant view is that a representation by the principal "operates as an estoppel": *Freeman & Lockyer* at p 503 (see also, *Banque Nationale de Paris v Tan Nancy and another* [2001] 3 SLR(R) 726 at [68]). In the absence of authority, a principal may still ratify his agent's conduct either expressly or impliedly. This may even be inferred by silence or inactivity (*Eng Gee Seng v Quek Choon Teck and others* [2010] 1 SLR 241 at [35]).

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131 Defence and Counterclaim (Amendment No 1) para 28.

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110 Both parties have presented lengthy submissions on whether authority was granted to IBRIS, and if it was not, whether the plaintiff ratified IBRIS's conduct, *eg*, its storage of the PME cargo at the Banyan Terminal. In tackling these questions, I find it instructive to consider the case of *Jowitt & Sons v Union Cold Storage Company* [1913] 3 KB 1 ("*Jowitt & Sons*"). British Standard Produce Company Limited ("British Standard") was in the meat and stored frozen meat business. The plaintiffs financed British Standard's business by paying the purchase price for Australian frozen meat being imported into England. They then reimbursed themselves out of the proceeds of bills of exchange discounted by the Bank of Australasia. These bills had been drawn to the bank's order by the plaintiffs and accepted by British Standard. Bills of lading for the meat were deposited with the bank as security that the bills of exchange would be met. Upon the meat's shipment to England, British Standard placed it in the defendants' cold store. The meat was to be delivered to the bank's order or against the bills of lading. An express term of the storage agreement stipulated that:

> Goods are only received subject to a general lien for all charges accrued and accruing against the storer or for any other moneys due from the owners of the goods, and if not removed after seven days notice has been given to the storer, or sent by post to his last known address, may be sold to defray the liens and all expenses incurred.

111 British Standard defaulted on the bills of exchange. The plaintiffs paid the bank and, having obtained the bills of lading from the bank, presented these to the defendant demanding delivery of the meat. The defendants refused, purporting to exercise a lien over the meat for the storage charges due from British Standard.

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112 Scrutton J made several important findings. The bank knew that British Standard had stored the meat with the defendants and that there would have been a storage agreement between the parties. Importantly, it was not relevant that the bank did not know the specific details of the storage agreement or the precise wording of the clauses. It had to be assumed that the bank would have been aware that the usual terms of the agreement included a general lien. In authorising the storage of the meat with the defendants, the bank (and the plaintiffs) were subject to the defendants' lien.

113 This reasoning can be analogised with the present facts. The plaintiff was aware that IBRIS was storing the PME cargo at the Banyan Terminal. It was not necessary for the plaintiff to have been aware of the existence of cl 20 of the Service Agreement or its precise terms. As a commercial party it should have appreciated that a right of lien would have been present in the Service Agreement. The plaintiff's expert, Mr Nurtanio, gave evidence that it is in fact industry practice that:[132]

> …every storage agreement will incorporate some form of general lien. This allows the storage provider to detain cargo for any amounts owed by the user to the provider – even when these sums do not relate to the storage of the particular cargo.

In accepting that the PME cargo would be stored at the Banyan Terminal, I find that the plaintiff must have impliedly granted authority to IBRIS to grant possession of the PME to the defendant on terms that would include a right of lien. In fact, that must have been why the plaintiff and IBRIS came up with the idea of the Storage Agreement. In my view, it was an attempt, albeit ill-conceived, to circumvent any lien that the defendant had over the PME cargo.

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132 Nurtanio's AEIC, p 38; NE, 12 March 2019, p 51, lines 8-19.

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Thus, I find that the PME cargo, even if it continued to be owned by the plaintiff, would be subject to the contractual lien in the Service Agreement. The upshot of this is that the defendant was entitled to exercise its lien over the entirety of the PME cargo, including the delivery of 21.30 metric tonnes to which the plaintiff retained title to by way of the execution of the Storage Agreement, as I have found.

114 My findings above as to actual authority means that it is unnecessary for me to come to any definitive conclusion on the issue of IBRIS's apparent authority. Here, the plaintiff raises the point that it never made any kind of unequivocal representation to the defendant that IBRIS was the plaintiff's agent in respect of the PME cargo.[133] It never communicated in any way with the defendant prior to or when the PME cargo was being transferred into Tank 1102. In fact, the defendant's own evidence is that it did not even know of the plaintiff's existence, until the plaintiff surfaced at the end of December 2014 to claim that it was the owner of the PME cargo.[134] Hence, an estoppel cannot arise, and in its absence, no apparent authority can be found. These are forceful points. "There is no sufficient representation if the representation flows from the agent rather than the principal; an agent cannot make a representation as to his own authority" (*The Law of Agency* at para [05.034]. See also, *Skandinaviska Enskilda Banker AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 ("*Skandinaviska*") at [38]). Having said that, there are certain circumstances where a party may be held liable as principal even where no

133 PCS, para 351.

134 Ong's AEIC, para 55.

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manifestation or representation as to the authority of another party to act on its behalf has been made to a third party (Peter Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st Ed, 2014 at para [2-101]). What constitutes such circumstances remains uncertain (*The "Bunga Melati 5"* [2016] 2 SLR 1114 ("*The Bunga Melati*") at [8]). However, it appears that, where there is a legal or equitable duty to make a disclosure, communication or correction, silence or inaction may be taken as a valid representation for the purposes of establishing a basis for estoppel (*The Bunga Melati* at [14]). Here, there were certain aspects of the plaintiff's conduct that might have caused the defendant to form the belief that either the PME cargo was owned by IBRIS or that IBRIS had the true owner's authority to store the PME cargo at the Banyan Terminal and subject it to the defendant's right of lien.

115 The plaintiff claimed to have title over the entirety of the PME cargo. As I have found, it only retained title to the last batch of the PME cargo that was delivered on 17 October 2014, that is, 21.30 metric tonnes. Be that as it may, it is clear from the evidence that the plaintiff knew that the PME cargo was being stored at the Banyan Terminal, which belonged to the defendant. The plaintiff knew that the defendant would have charged IBRIS for such storage services. Further, as I have found, the plaintiff must have known that the defendant would have some form of lien over the stored products for unpaid charges. Yet, despite its claim to ownership over the PME cargo, the plaintiff remained silent and did not inform the defendant as soon as possible about its position about title over the PME cargo. Neither is there any evidence before me that the plaintiff had instructed IBRIS to inform the defendant of the plaintiff's ownership. If the defendant had been so informed, it could well have refused to store the PME cargo until an agreement had been reached with the plaintiff as to storage

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charges and its right of lien. After all, both the plaintiff and defendant knew at the material time that IBRIS was in financial difficulties.

116 In these rather specific circumstances, while I have not come to a firm conclusion on this point, the facts do suggest that the plaintiff *may* be estopped from denying the defendant's right of lien over the PME cargo. This is because the plaintiff had effectively constituted IBRIS as its bailee for the specific purpose of storing, or continuing the storage of, the PME cargo at the Banyan Terminal. The plaintiff then arguably had a "duty to speak" to correct what it ought to have known would be the defendant's wrong impression. Its failure to do so led the defendant to believe it could exercise its lien over the cargo.

The defendant's counterclaim

117 The defendant argues that the plaintiff is liable for storage charges and other expenses incurred (*eg*, cleaning and waste disposal fees) between 1 October 2014 and 6 June 2015. The particulars of its counterclaim are set out at [37] above. The defendant's position is that its entitlement to these sums flows from the plaintiff's authorisation to IBRIS to store the PME cargo at the Banyan Terminal. Further, the defendant asserts that it has a claim in unjust enrichment, the requirements of which are set out in *Skandinaviska* at [110]. The plaintiff was unjustly enriched by storing the PME at the Banyan Terminal at no cost. This was at the expense of the defendant, who was unable to utilise Tank 1102 and its connecting tanks, Tanks 1104 and 1106, owing to the "common system".[135]

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135 DCS, paras 285-287.

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118 In light of the fact that title passed to IBRIS for the PME delivered prior to 15 October 2014 and, more importantly, because the defendant's lien operated over the PME cargo in its totality, I find that the plaintiff is not liable for these amounts claimed. Assuming that the plaintiff still held title, while IBRIS was impliedly conferred with authority to store the PME cargo at the Banyan Terminal and to subject it to the defendant's right of lien *until full payment of what IBRIS owed*, it does not follow that the plaintiff is bound to pay storage charges incurred by IBRIS. The defendant has not shown that IBRIS had actual or apparent authority to bind the plaintiff to an obligation to pay the storage charges in the Service Agreement to the defendant. Furthermore, as pointed out by the plaintiff, the defendant has not pleaded a claim in *quantum meruit* for charges in respect of its storage of the PME cargo.

119 The defendant's unjust enrichment argument is also untenable. The critical point here is that the defendant is entitled to exercise its lien over the whole of the PME cargo, which militates against any argument that the plaintiff has been unjustly enriched. The submission about the "common system" is also not supported by the evidence, which instead shows that the defendant had the ability to "blind off"[136] Tanks 1104 and 1106 and use them to store other products once the Service Agreement had come to an end. I therefore find that there is no merit in the counterclaim.

Conclusion

120 For the reasons above, I dismiss both the plaintiff's claim and the defendant's counterclaim.

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136 NE, 15 March 2019, p 76, lines 11 to 12.

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121 I will deal separately with the question of costs.

Ang Cheng Hock
Judge

Eng Zixuan Edmund, Brinden Anandakumar and Chuah Hui Fen, Christine (Fullerton Law Chambers LLC) for the plaintiff;
Chew Kei-Jin, Tan Silin, Stephanie and Tay Shi-En, Hannah (Ascendant Legal LLC) for the defendant.

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